

# CRS Report for Congress

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## Congressional or Federal Charters: Overview and Current Issues

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### Summary

A congressional or federal charter is a federal statute that establishes a corporation. Congress has issued charters since 1791, although most charters were issued after the start of the 20<sup>th</sup> century. Congress has used charters to create a variety of corporate entities, such as banks, government-sponsored enterprises, commercial corporations, venture capital funds, and more. Recently, Congress has faced two issues involving its use of charters — confusion over who is responsible for the activities of chartered corporations and the challenges of managing them. This report will be updated if relevant legislative action occurs.

### What Is a Congressional or Federal Charter?

In the Anglo-American linguistic tradition, the word “charter” has been used to refer to many legal writs, including “articles of agreement,” “founding legislation,” “contracts,” “articles of incorporation,” and more.<sup>1</sup> The varied uses of this term to refer to so many different legal writs may reflect the term’s etymology. “Charter” is derived from the Latin

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<sup>1</sup> Examples follow. The articles of agreement among nation-states that set forth the objectives and fundamental structures of the United Nations are referred to as a charter; see *Charter of the United Nations* at [<http://www.un.org/aboutun/charter/>]. A *New York Times* editorial noted, “The C.I.A. charter, a federal statute, prohibits...”; editorial, “The Domestic Spying Trap,” *New York Times*, May 13, 2003, p. A30. “A charter is a contract between an organized group and a state-authorized body...”; Jeanne Allen, “Chartering Success; The Schools for Students Who Need It Most,” *Washington Times*, Sept. 16, 2002, p. A21. “The resolution calling for the board to consider changing the way that members are elected .... If the board were to follow shareholders’ recommendation ... shareholders would have to vote to approve a change to the company’s charter”; Christine Frey, “Costco Shareholders Split on 2 Proposals,” *Seattle Post-Intelligencer*, Jan. 30, 2004, p. C1. The U.S. National Archives refers to the U.S. Constitution, the Declaration of Independence, and the Bill of Rights as “the Charters of Freedom”; see [<http://www.archives.gov/national-archives-experience/charters/charters.html>].

<b>Report Documentation Page</b>			Form Approved OMB No. 0704-0188	
<p>Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.</p>				
1. REPORT DATE <b>25 AUG 2005</b>	2. REPORT TYPE <b>N/A</b>	3. DATES COVERED <b>-</b>		
<b>4. TITLE AND SUBTITLE</b> <b>Congressional or Federal Charters: Overview and Current Issues</b>			5a. CONTRACT NUMBER	
			5b. GRANT NUMBER	
			5c. PROGRAM ELEMENT NUMBER	
<b>6. AUTHOR(S)</b>			5d. PROJECT NUMBER	
			5e. TASK NUMBER	
			5f. WORK UNIT NUMBER	
<b>7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)</b> <b>Congressional Research Service The Library of Congress 101</b> <b>Independence Ave SE Washington, DC 20540-7500</b>			8. PERFORMING ORGANIZATION REPORT NUMBER	
<b>9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)</b>			10. SPONSOR/MONITOR'S ACRONYM(S)	
			11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
<b>12. DISTRIBUTION/AVAILABILITY STATEMENT</b> <b>Approved for public release, distribution unlimited</b>				
<b>13. SUPPLEMENTARY NOTES</b>				
<b>14. ABSTRACT</b>				
<b>15. SUBJECT TERMS</b>				
<b>16. SECURITY CLASSIFICATION OF:</b> a. REPORT <b>unclassified</b>			<b>17. LIMITATION OF ABSTRACT</b> <b>SAR</b>	<b>18. NUMBER OF PAGES</b> <b>6</b>
b. ABSTRACT <b>unclassified</b>				
c. THIS PAGE <b>unclassified</b>				

“charta” or, perhaps, the ancient Greek “chartēs,” both of which mean “paper.”<sup>2</sup> As used in federal statutory law, the term “charter” usually has carried a much more specific meaning. A congressional or federal charter is *a federal statute that establishes a corporation*. Such charters typically provide the following characteristics for the corporation:

- (1) Name;
- (2) Purpose(s);
- (3) Duration of existence;
- (4) Governance structure (e.g., executives, board members, etc.);
- (5) Powers of the corporation;
- (6) Federal oversight powers.

Beyond conferring the powers needed to achieve its statutorily assigned goal, a charter usually provides a corporation with a set of standard operational powers: the power to sue and be sued; to contract and be contracted with; to acquire, hold, and convey property; and so forth.

## Congress’s Use of Charters

Many of the original 13 colonies were established by royal charters, and both colonies and states incorporated governmental and private entities before the United States was established.<sup>3</sup> Yet, at the Constitutional Convention in Philadelphia in 1787, the Founders disagreed over the wisdom of giving the proposed federal government the power to charter corporations.<sup>4</sup> Nevertheless, Congress chartered its first corporation — the Bank of the United States — in February of 1791 (1 Stat. 192 §3).<sup>5</sup> Any dispute over Congress’s power to charter corporations was effectively put to an end by the Supreme Court’s decision in *McCulloch v. Maryland* in 1819 (17 U.S. (4 Wheat.) 315). The Court

<sup>2</sup> On the etymology, see *Oxford English Dictionary Online* (Oxford, U.K.: Oxford University Press, 2005) and Charlton T. Lewis and Charles Short, *A Latin Dictionary* (Oxford, U.K.: Oxford University Press, 1879).

<sup>3</sup> Ben Perley Poore, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* (Washington: GPO, 1878); and Joseph S. Davis, *Essays in the Earlier History of American Corporations* (Cambridge: Harvard University Press, 1917).

<sup>4</sup> The specific objections to federal incorporation are unclear. However, one author suggests that some Founders may have feared that the power to grant charters might be used to establish or convey exclusive privileges and monopolies to private businesses. Simeon E. Baldwin, “American Business Corporations Before 1789,” *The American Historical Review*, vol. 8, no. 3, Apr. 1903, pp. 464-465.

<sup>5</sup> This was not the first congressionally chartered national bank in the United States. One of the earliest acts of Congress (May 26, 1781) under the Articles of Confederation (which were ratified March 1, 1781) was to charter a bank.

ruled that incorporation could be a “necessary and proper” means for the federal government to achieve the ends assigned to it by the U.S. Constitution.<sup>6</sup>

After chartering the national bank, though, for the next century, Congress issued charters almost solely in its role as manager of the affairs of the District of Columbia (Article I, §8, cl. 17). The District of Columbia, which became the seat of the federal government in 1790, had neither a general incorporation law nor a legislature that could grant charters. So it fell to Congress incorporate the District’s corporations. Thus, Congress issued charters to establish the office of the mayor and the “Council of the City of Washington” in 1802 (2 Stat. 195-197) and to found the Washington City Orphan Asylum in 1828 (6 Stat. 381).<sup>7</sup>

In the 20<sup>th</sup> century, Congress began chartering a large number of corporations for diverse purposes. In part, Congress’s resort to the corporate device was a response to a host of national crises, such as the two World Wars (which required the production of an enormous number of goods) and the Great Depression (which revealed the limited power the federal government had over the national economy). Corporations, it was thought, were by nature better suited than typical government agencies to handle policy areas that required commercial-type activities (for example, selling electrical power, as the Tennessee Valley Authority does).<sup>8</sup>

While each congressionally chartered corporation is unique in that it is fashioned for a very particular purpose, these entities still may be sorted into rough types. An elementary division is between those chartered as nonprofit corporations versus those that are not.<sup>9</sup> **Table 1** provides a further — but not exhaustive — typology of congressionally chartered corporations.

<sup>6</sup> Thus, the power to incorporate, the Court ruled, lies with both of the sovereigns in the U.S. federal system — states and the federal government.

<sup>7</sup> For more information on early congressional charters, see Margaret Fennell, *Corporations Chartered by Special Act of Congress, 1791-1943* (Washington: Library of Congress, 1944).

<sup>8</sup> U.S. Senate, Committee on Governmental Affairs, *Managing the Public’s Business: Federal Government Corporations*, by Ronald C. Moe, S.Prt. 104-18, 104<sup>th</sup> Cong., 1<sup>st</sup> sess. (Washington: GPO, 1995).

<sup>9</sup> While the term “not-for-profit corporation” may be more accurate than “nonprofit corporation” — the former is defined in tax law, the latter is a colloquialism that, strictly read, denotes that an entity is not bringing in more revenues than its expenditures — the latter is used because it is the preferred term of the *U.S. Code*.

**Table 1: Types of Congressionally Chartered Corporations**

Type	Purpose(s)	Examples
<b>Nonprofit Corporations</b>		
Title 36 Corporations <sup>10</sup>	Fraternal and patriotic organizations.	Daughters of the American Revolution
Foundations, Trusts, and Miscellaneous Corporations Supporting Nonprofit Uses	Accept and expend government and private funds on goods and services that may be under-provided by the private market.	National Park Foundation, National Trust for Historic Preservation in the United States, Legal Services Corporation
<b>Corporations</b>		
Banks	Provide financial services and promote the health of the economy.	Export-Import Bank, Federal Reserve Banks
Commercial Corporations (also called “government corporations”) <sup>11</sup>	Sell products and services.	Tennessee Valley Authority
Government-Sponsored Enterprises <sup>12</sup>	Add liquidity to secondary loan markets	Fannie Mae and Freddie Mac
Public Authorities and Commissions <sup>13</sup>	Interstate bond-issuing entities that build and operate transportation systems.	Washington Metropolitan Area Transit Authority, Owensboro Bridge Commission
Venture Capital Funds <sup>14</sup>	Invest in small firms to develop technologies and private firms.	Telecommunications Development Fund <sup>15</sup>

<sup>10</sup> These entities are referred to as “Title 36 corporations” because they are found in Title 36 of the U.S. Code. CRS Report RL30340, *Congressionally Chartered Nonprofit Organizations (“Title 36 Corporations”): What They Are and How Congress Treats Them*, by Ronald C. Moe and Kevin R. Kosar.

<sup>11</sup> CRS Report RL30365, *Federal Government Corporations: An Overview*, by Ronald C. Moe and Kevin R. Kosar.

<sup>12</sup> CRS Report RS21663, *Government Sponsored Enterprises (GSEs): An Institutional Overview*, by Kevin R. Kosar.

<sup>13</sup> Jameson Doig, *Empire on the Hudson: Entrepreneurial Vision and Political Power at the Port of New York Authority* (New York: Columbia University Press, 2002).

<sup>14</sup> CRS Report RL30533, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics*, by Ronald C. Moe and Kevin R. Kosar.

<sup>15</sup> In some instances, federal venture capital funds have been established without a charter. For more information, see CRS Report RL30533, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics*.

## Current Issues

In recent years, Congress has faced issues regarding congressionally chartered corporations. Primarily, these issues have centered on the questions of who is responsible for the activities of these entities and the federal government's power to manage the corporations.

### **Responsibility for the Actions of Congressionally Chartered Corporations.**

The awarding of a charter to an already existent fraternal or patriotic organization is purely honorific. Unlike other congressional charters, a Title 36 corporation charter does not create a body corporate where one did not previously exist. Yet, when a charter is awarded to such an entity, many members of the public perceive this action as an expression of congressional support for all of the group's activities. Thus, for example, when the congressionally chartered American Gold Star Mothers refused to admit to membership a non-U.S. citizen, some individuals and members of the media called upon Congress to intervene and rectify this situation.<sup>16</sup> Approximately 100 Title 36 corporations exist, which raises the potential for more requests for congressional intervention in these groups' activities.<sup>17</sup>

This issue is not limited to federally chartered fraternal groups. Many non-Title 36 corporations have been chartered which are neither clearly governmental nor private. The lines of accountability for such an entity's actions may be unclear. For example, the nonprofit National Endowment for Democracy (NED), which was chartered to support democratic movements and governments abroad, advertises itself as private.<sup>18</sup> Yet, NED regularly receives appropriations — \$60 million for FY2005 alone (P.L. 108-447, Title IV). Its board of directors includes many current and former members of the legislative and executive branches. These features have prompted some to speak of NED as an instrumentality of the federal government.<sup>19</sup> The chartering of corporations that are not

<sup>16</sup> Shawn Cohen, "Gold Star Denial of GI's Mom Blasted," May 27, 2005, p.1; and Peter Applebome, "Some Mothers Are More Equal Than Others," *New York Times*, June 1, 2005, p. B1. Under its charter (36 U.S.C. 21104), American Gold Star Mothers, like many Title 36 corporations, was given considerable latitude to define its criteria for membership eligibility. Rectifying this situation, then, would have required Congress to pass a law that rewrote this organization's charter so that it would expand its membership eligibility criteria. As it happened, American Gold Star Mothers amended its constitution to permit non-U.S. citizen mothers to join.

<sup>17</sup> Some of the more well-known ones include the American Legion, Big Brothers-Big Sisters of America, Boy Scouts of America, Girl Scouts of the United States of America, National Academy of Sciences, United Service Organizations, Inc. (commonly referred to as the U.S.O.), and Veterans of Foreign Wars of the United States. In recent years, Congress has avoided chartering new Title 36 corporations. On Title 36 corporations generally and for a list of all Title 36 corporations, see CRS Report RL30340, *Congressionally Chartered Nonprofit Organizations ("Title 36 Corporations")*, pp. 15-17.

<sup>18</sup> See website of NED [<http://www.ned.org/about/about.html>].

<sup>19</sup> Juan Forero, "The Chavez Victory: A Blow to the Bush Administration's Strategy in Venezuela," *New York Times*, Aug. 20, 2004, p. A1.

clearly governmental or private has caused sufficient confusion that in some instances the Supreme Court has been asked to intervene and make a determination of their status.<sup>20</sup>

**Federal Management of Corporations.** In centuries past, states and municipalities often limited the duration of a charter; a corporation would expire unless the sovereign renewed its charter. This “sunset and review” practice has fallen by the wayside; usually, Congress charters entities to exist without temporal limits. Critics argue that a cost of this practice is that it permits a corporation to continue to operate whether or not it well serves the public. A corporation chartered to have “perpetual succession” can be abolished only through enactment of a new law — which seldom occurs. Long-living chartered entities have been accused of taking business from the private sector, moving into areas of business or activities outside the bounds of their charters, and developing networks of influence to protect themselves from abolition.<sup>21</sup>

The management of government corporations has been made difficult by a few factors. First, no single federal department or office is charged with overseeing the activities of federally chartered corporations. Second, some of these entities are established within departments, whose secretaries oversee them (e.g., the St. Lawrence Seaway Development Corporation in the Department of Transportation and the Federal Financing Bank in the U.S. Department of the Treasury). Many, though, are established independently of any department and have few, if any, federal appointees on their boards or in their executive ranks. (This is especially the case with nonprofit corporations chartered as “private” entities.) This separation of corporations from departments has made the federal management of corporations more difficult.<sup>22</sup> Finally, the Government Corporation Control Act (31 U.S.C. 9101-10) provides many tools for managing chartered corporations’ activities. Congress has exempted many corporations from some or all of the act’s provisions.

<sup>20</sup> In these instances, the Court found that the entities in question were, in fact, governmental, despite the entities’ assertions to the contrary. *Cherry Cotton Mills v. United States* (327 U.S. 536 (1946)) and *Michael A. Lebron v. National Railroad Passenger Corporation* (513 U.S. 374 (1995)). For an analysis of entities that blend private and public sector attributes, see Ronald C. Moe, “The Importance of Public Law: New and Old Paradigms of Government Management,” in Phillip J. Cooper and Chester A. Newland, eds., *Handbook of Public Law and Administration* (San Francisco: Jossey-Bass Publishers, 1997), pp. 41-57.

<sup>21</sup> Richard Geddes, ed., *Competing with the Government: Anticompetitive Behavior and Public Enterprises* (Stanford, CA: Hoover Institution Press, 2004), pp. 1-58, 85-112. GSEs reportedly used their government privileges to raise funds for nonmortgage investments. U.S. General Accounting Office, *Federal Oversight Need in Nonmortgage Investments*, GAO/GGD-98-48 (Washington: GAO, 1998). On political influence, see Jonathan Koppell, *The Politics of the Quasi-Government* (Cambridge, UK: Cambridge University Press, 2003), pp. 103-118.

<sup>22</sup> This is due to the exacerbation of the principal-agent problem. In public administration theory, the principal-agent problem refers to the difficulty that the principal (in this case, the government) has in knowing and, therefore, directing the activities of the agent (here, the corporation). The more closely that a corporation is tethered to a department, the higher the probability is that the department heads will have adequate information to direct the corporation’s activities.